SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. 1378

October Term, 1968

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM H. LUTSKO and
HAROLD S. LUTSKO,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX.

		PAGE
A.	Opinions of the Courts Below	1
B.	Grounds Upon Which the Jurisdiction of this Honorable Court is Invoked	2
C.	Questions Presented for Review	2
D.	Constitutional Provisions and Statutes Involved	4
E.	Statement of the Cases	6
	1. The Trunzo Case	6
	2. The Ellison Case	7
	Testimony of Robert Westman	8
	3. The Richel Case	9
	4. The Dorothy Hines Case	10
	5. The Eva Byerly Case	10
	6. The Closing Argument of the Assistant District Attorney	11
F.	The Stage of the Proceedings and the Manner in Which the Constitutional Issues Were Raised in the Courts of Pennsylvania	11
G.	Reasons in Support of Allowance of Writ of Certiorari	13
	I. A State Court conviction for the crime of attempted false pretenses is constitutionally void where the only "overt act" is a false statement not relied upon and resulting in no economic detriment. Such a conviction violates the decisions of this Court	13
	II. The evidence of conspiracy to cheat and defraud supported no more than suspicion of an unlawful agreement and was not inconsistent with innocence. Therefore, there was no evidence upon which to sustain these convictions, and to permit them to stand would violate due process of law and the decisions of this Court	16

PAGE

III. To permit petitioner Harold Lutsko's conviction for false pretenses to stand would violate due process of law and the decisions of this Court because there is no evidence establishing the falsity of his representations 18

IV. The prejudicial conclusions of a prosecution witness, the inflammatory closing argument of the Assistant District Attorney coupled with the erroneous evidence of Robert Westman's plea of guilty (to which no exception was taken) created a prejudicial atmosphere which denied petitioners due process of law, particularly when so many cases were tried together 18

Appendix:

Opinion 20

Order 26

TABLE OF CASES.

Commonwealth v. Ellis, 349 Pa. 402, 404; 37 A. 2d 505 (1944) 15
Commonwealth v. Johnson, 312 Pa. 140 (1933) 13, 15
Commonwealth v. Petrillo, 338 Pa. 65 (1940) 17, 18
Commonwealth v. Willard, 179 Pa. Super. 368, 372; 116 A. 2d 751 (1955) 14
Sam Thompson v. City of Louisville, 362 U. S. 199; 80 S. Ct. 624 (1960) 15, 18

STATUTES.

18 Purdon's Pennsylvania Statutes:
Section 4836, Page 471 4
Section 4302, Page 149 5
Section 5107, Page 715 5
28 U. S. C. A. § 1257 (3) 2

CONSTITUTION OF THE UNITED STATES.

Fourteenth Amendment 4, 12

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William H. Lutsko and Harold S. Lutsko, by their attorney, H. David Rothman, Esquire, a member of the Bar of this Honorable Court, respectfully represent as follows:

A. Opinions of the Courts Below

Petitioners were tried and convicted before the Criminal Court of Allegheny County, Pennsylvania, and a jury, upon eight indictments (all tried together) charging the crimes of false pretense, attempted false pretense and conspiracy to cheat and defraud. The opinion of the trial judge and the order of November 29, 1967, denying defendants' motions for a new trial and for arrest of judgment are appended to this petition.

On February 1, 1968, Harold Lutsko was sentenced to imprisonment for not less than nine months nor more than four years; William Lutsko was sentenced to imprisonment

for not less than five months nor more than thirty-five and one half months. From these judgments of sentence, petitioners appealed to the Superior Court of Pennsylvania at No. 155 April Term, 1968. Their convictions were affirmed, *without opinion,* by the Memorandum Report of that Court at *213 Pa. Super. 780 (1968).*

A Petition for Allowance of Appeal was filed in the Supreme Court of Pennsylvania at No. 3074A Miscellaneous Docket. That petition was dismissed *without opinion* on February 17, 1969. Petitioners continue to be admitted to bail.

The opinion of the trial court, appended herein, is the only opinion in this case, and it has not been published.

B. Grounds Upon Which the Jurisdiction of this Honorable Court is Invoked

The jurisdiction of the Court is invoked to review the judgment of the Supreme Court of Pennsylvania entered February 17, 1969, wherein the petition for allowance of appeal from the Superior Court was refused.

The statutory provisions upon which jurisdiction is conferred is as follows: Supreme Court Jurisdiction, 28 U. S. C. A. § 1257 (3)—State Courts; Appeal; Certiorari

C. Questions Presented for Review

I. Where petitioners were engaged in the business of selling furnaces to residential consumers, and where alleged false representations were made relative to the condition of the consumers' old furnaces, are petitioners' convictions for the crimes of *attempted false pretense* violative of due process of law in that they are not supported by any evidence at all because the potential consumers did not re-

ly upon the representations and suffered no economic detriment?

II. Where petitioners were engaged in the business of selling furnaces to residential consumers and gained entry to private homes by promoting, in the first instances, a service to clean furnaces, and where alleged false representations were subsequently made relative to the consumers' old furnaces, are petitioners' convictions for the crimes of *conspiracy to cheat and defraud* violative of due process of law as not being supported by any evidence at all where the record establishes mere suspicion of an unlawful agreement and commercial practices equally consistent with innocence?

III. Where petitioner, Harold Lutsko, was engaged in the sale of furnaces, is his conviction for *false pretenses* violative of due process of law as not being supported by any evidence at all where he represented a particular furnace to be leaking carbon monoxide and proof of the falsity of the statement rested upon an examination of the furnace under changed conditions so that there is no evidence that the statement was false when made?

IV. Where a prosecuting witness improperly referred to a furnace contract as "crooked", and where the Assistant District Attorney in his closing argument appealed to the passions of the jury in urging them to convict to deter others from crime, and where a co-defendant was erroneously permitted to testify as to his plea of guilty (without objection), were petitioners denied due process of law, particularly where several indictments were tried to the same jury?

D. Constitutional Provisions and Statutes Involved

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 Purdon's Pennsylvania Statutes Section 4836, Page 471 —CHEATING BY FRAUDULENT PRETENSES:

Whoever, by any false pretense, obtains the signature of any person to any written instrument, or obtains from any other person any chattel, money, or valuable security, with intent to cheat and defraud any person of the same, or being an officer, manager, agent, employe of or in any way interested in any person, by false pretense, knowingly and with intent to defraud, procures, obtains, or aids, assists, or abets in obtaining from any other persons, any chattels, moneys, or valuable securities for such person of which he is an officer, manager, agent, employe or in which he is in any way interested, is guilty of a felony, and on conviction, shall be sentenced to pay a fine not exceeding five thousand dollars ($5,000), or undergo imprisonment not exceeding five (5) years, or both.

If, upon the trial of any person indicted for such a felony, it shall be proved that he obtained the property in question in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such felony. No person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts. 1939, June 24, P. L. 872, § 836; 1943, May 21, P. L. 306, § 1.

18 Purdon's Pennsylvania Statutes Section 4302, Page 149 —Conspiracy to do an Unlawful Act:

Any two or more persons who falsely and maliciously conspire and agree to cheat and defraud any person of his moneys, goods, chattels, or other property, or do any other dishonest, malicious, or unlawful act to the prejudice of another, are guilty of conspiracy, a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment, by separate or solitary confinement at labor or by simple imprisonment, not exceeding two (2) years, or both. 1939, June 24, P. L. 872, § 302.

18 Purdon's Pennsylvania Statutes Section 5107, Page 715 —Attempts to Commit Crime:

If, on the trial of any person charged with felony or misdemeanor, it shall appear to the jury upon the evidence, that the defendant did not complete the offense charged, but was guilty only of an attempt to commit the crime, he shall not by reason thereof be entitled to be acquitted, but the jury may return, as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same.

Thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indict-

ment for attempting to commit the particular felony or misdemeanor charged in the indictment.

No person so convicted shall be liable to be thereafter prosecuted of an attempt to commit the felony or misdemeanor for which he was so convicted. 1939, June 24, P. L. 872, § 1107.

(This Statute is not strictly involved in the instant prosecutions; they are based, more appropriately, upon a common law attempt to commit a statutory offense.)

E. Statement of the Cases

1. The Trunzo Case—Attempted False Pretense at No. 535 January Term, 1966 Conspiracy to Cheat and Defraud at No. 536 January Term, 1966

Francis J. Trunzo received a post card from the Cavalier Heating Company and contacted that establishment to take advantage of an offer to clean or tune up his gas furnace (T. 10-12).* In response to that inquiry, Felton Hughes, a co-defendant, but not a party to these proceedings, visited the Trunzo home on October 22, 1965, examined the furnace with a light, indicated that there was something wrong with the furnace and called his supervisor (T. 12-13). Defendant William Lutsko came to the home, looked at the furnace and represented that the ductwork was illegal and defective and that a red tag (warning tag) would have to be affixed to the furnace. He added that Trunzo's neighbors would have to be apprised of this condition (T. 15). He represented that there was a crack in the furnace, that the defective part could be replaced for $550.00, but recommended a new furnace at $1300 (T. 16-17). He added that carbon monoxide was probably leaking into the house from the

* Page references are to pages in original trial transcript.

crack in the furnace (T. 18) and that the gas was probably doing harm and would continue to do harm to the unborn child of the Trunzos, for Mrs. Trunzo was pregnant at the time (T. 19). Defendants left the Trunzo home without selling any furnace parts or a new furnace (T. 20).

Trunzo called the gas company who sent an inspector to the home the following day, October 23, 1965 (T. 21). He spent an hour and a half to two hours inspecting the furnace, whereas the defendants did not spend more than five minutes, according to the evidence presented by the Commonwealth (T. 22). Trunzo called the District Attorney's office and wrote a letter to the District Attorney (T. 24). As of the date of trial, June 20, 1967, the Trunzos had the same furnace in their home and no changes or repairs had ever been made (T. 24).

The furnace inspector sent by the gas company, Fornicoia, found nothing wrong with the heat exchanger of the Trunzo furnace and did not find any leak (T. 83). He found no crack in the combustion chamber; *in his opinion,* there was nothing wrong with the furnace. James Petrucci, also from the gas company, went to the Trunzo home in February, 1966, found no cracks or imperfections and no trace of escaping carbon monoxide (T. 93-95), but conceded on some occasions people can smell escaping gas and on other occasions no odor can be detected (T. 99).

2. The Ellison Case—Attempted False Pretense at No. 572 January Sessions 1966 Conspiracy to Cheat and Defraud at No. 573 January Sessions 1966

Mrs. Mary Ann Ellison lived in her home for five years before receiving a card in July, 1965, from Cavalier Heating Company, relative to an offer to clean her furnace (R. 40-42). Robert Westman, a co-defendant, but not involved

in these proceedings, came to the house (R. 44). Mr. Ellison testified a man identifying himself as being from Cavalier Heating Company came to the house in October, 1965, removed a panel from the furnace, looked into the furnace with a flashlight and then made a telephone call (R. 52-54).

Petitioner, Harold Lutsko, then came to the house, looked in the furnace for about a minute and stated there was a high pressure leak and there appeared to have been an explosion in the chamber, that the condition was dangerous and should be repaired (R. 55-56). He added he knew who had made the furnace and doubted that it could be repaired; Mr. Ellison requested estimate of the cost to replace or repair (R. 57). Petitioner Lutsko mentioned a contract; Ellison wanted to see an estimate, but none was ever given (R. 69). He said Lutsko had a book of contracts, that a price was given, but none was ever stated for the record (R. 69-70).

Harry Sellers, a customer service representative from a gas company, accompanied by Mr. Fay and Detective John Clarkin went to the Ellison home on October 29, 1965 (R. 104-105). No water leakage or evidence of prior leakage was discovered; nothing wrong was detected (R. 106-107). Sellers indicated honest differences of opinion exist as to the condition of equipment (R. 112). William Drummond, a plumbing and heating contractor visited the Ellison home in October, and discovered no signs of a leak, past or present (R. 113-115).

TESTIMONY OF ROBERT WESTMAN

Without objection from defense counsel, Robert Westman testified for the Commonwealth that he pleaded guilty to attempted false pretenses and conspiracy to cheat and defraud the Ellisons (R. 124). He indicated he was in-

structed to check furnaces and if he found nothing wrong, he was to leave the premises (R. 125). He said he personally did not see the alleged high pressure leak (R. 126), but he added that he did believe there was something wrong with the Ellison boiler or burners because of rust which had accumulated (R. 145). Westman added, as a general proposition, that employees were instructed to find something wrong with furnaces of prospective customers, and then call superiors (R. 128). They were to get a salesman into the house to sell a furnace; they were instructed to see if they could find something wrong (R. 129).

3. The Richel Case—False Pretense at No. 496 June Sessions 1966

Mrs. Agnes Richel testified that after a man came to her house to clean her furnace and said something was wrong with it, petitioner Harold Lutsko came to her home and said the furnace was leaking carbon monoxide (R. 157-158). She signed a contract for the purchase of a new furnace for $1500.00 (R. 158). Her furnace had not been serviced in 19 years (R. 162).

Domenick Volpe went to the Richel home on March 30, 1966, repaired a small leak in the pilot tube of the furnace, but said there was no carbon monoxide (R. 174-176). When Volpe saw the furnace, it had been cleaned, and he said it could have been in worse condition before the cleaning, which was when petitioner examined it (183). The court refused a motion to strike Volpe's testimony because there was no evidence that the furnace was in the same condition when the two different examinations were made—that of Volpe and that of petitioner (R. 184-185). Louis C. Boron, a gas company representative, went to the Richel home after Volpe, but on the same day (R. 187); he said there

was no gas leak and no carbon monoxide, but he could offer no statement as to the condition of the furnace when examined by petitioner (R. 188).

During the course of Mrs. Richel's testimony, she indicated that her husband had not signed the contract because it was "crooked." Defense counsel moved for withdrawal of a juror, but the motion was refused (R. 159). She made a second reference to a crooked contract (R. 164) and the jury was instructed to disregard the remark.

4. The Dorothy Hines Case—Attempted False Pretense at No. 547 January Term, 1966 William Lutsko only

Mrs. Dorothy Hines indicated that after a man came to look at her furnace, Petitioner William Lutsko came there, indicated gas was leaking, there were carbon monoxide fumes and that the furnace was not adequate for her house. He said repairs were not in order and the price of a new furnace would be over $1,000.00 (R. 201). She was frightened for the safety of her children and called the gas company (R. 202). Edward J. Walsh, gas company representative went to her home, found no cracks or leaks in the furnace (R. 219), and conceded that the odor of gas could be present one day and not the next (R. 223).

5. The Eva Byerly Case—Attempted False Pretense and Conspiracy to Cheat and Defraud at No. 495 June Term, 1966

Eva Byerly testified that a man from Cavalier Heating came to her home, looked at her furnace and made a telephone call (R. 22). William Lutsko came, examined the furnace for thirty minutes, and told her she needed a new one, that hers was dangerous and leaking carbon monoxide (R. 230). Prices were mentioned, but she never signed a

contract (R. 232). She did not believe she needed a new furnace (R. 239). Subsequent inspection by a gas company representative on March 31, 1966, revealed no gas leak, safety pilot was in good operation, there were no cracks and that the furnace was in excellent condition and in good operating condition (R. 254-257).

6. The Closing Argument of the Assistant District Attorney

Trial counsel for petitioners took exception to the closing argument made by the Assistant District Attorney, which exception was overruled by the trial court. The material portions of the record (R. 382-383) are as follows:

> "Mr. Teitelbaum: The Prosecutor in his closing arguments to the Jury said on numerous occasions and emphasizes that the guilty verdict should be brought back because it would deter crime by some other person. In fact he said this would put an end to some kind of illegal racket that is costing all kinds of money to all kinds of people.
>
> Mr. O'Hanesian: I stipulate to that. I said that.
>
> Mr. Teitelbaum: I think it is an appeal to passion and highly improper argument. The question is whether these people are guilty or not guilty, and not whether or not that is going to deter some other person from committing some other kind of offense. I respectfully move for the withdrawal of a Juror. I don't think we can get a fair ruling from the Jury after that argument."

F. The Stage of the Proceedings and the Manner in Which the Constitutional Issues Were Raised in the Courts of Pennsylvania

The thrust of petitioners' position is that there is no evidence upon which these convictions can stand. The first test of the issue in the Pennsylvania Courts came at the

conclusion of the case submitted by the Commonwealth when defense counsel orally demurred to the evidence (R. 261-262). At the conclusion of the trial judge's charge to the jury, defense counsel took exception to his failure to instruct that the jury must find *reliance* on the alleged false pretenses to support a conviction for the crimes of attempted false pretense (R. 412).

In addition to a motion for a new trial, petitioners filed a motion in arrest of judgment in the trial court following the jury's verdict of guilty. These motions were the basis of the opinion of the trial court appended to this petition.

By their brief in the Superior Court of Pennsylvania, petitioners submitted the following statement of questions involved:

1. Should not those acts which comprise mere preparation for the contemplated crime be distinguished from those acts which constitute the actual perpetration thereof?

2. May there be a conviction for the crime of attempting to cheat by fraudulent pretenses where the alleged victim is aware that the pretenses are false?

3. Did the Commonwealth offer sufficient proof at trial to sustain the convictions for conspiracy to cheat and defraud?

4. Have the appellants been deprived of their constitutional right of Due Process of Law under the Fourteenth Amendment to the United States Constitution as a result of the lack of a proper standard of guilt?

5. Were the remarks of the Assistant District Attorney and the prosecuting witnesses sufficiently prejudicial to the rights of appellants as to deprive them of Due Process of Law and to require a new trial?

The brief in the Superior Court of Pennsylvania was incorporated in the Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.

G. Reasons in Support of Allowance of Writ of Certiorari

I. A State Court conviction for the crime of attempted false pretenses is constitutionally void where the only "overt act" is a false statement not relied upon and resulting in no economic detriment. Such a conviction violates the decisions of this Court.

The decision of the trial judge in these cases rests upon *Commonwealth v. Johnson,* 312 Pa. 140 (1933) to support the proposition that false statements, without more, constitute *overt acts* justifying conviction of the crime of attempted false pretenses, assuming of course, a fraudulent intent and a failure to achieve the desired result. Petitioners respectfully urge that review of that position is warranted because to permit that decision to stand is to allow imprisonment for conduct which falls constitutionally short of a criminal offense.

The dissenting opinion of Justice Maxey in *Johnson, supra,* comports with the many decisions of this Court as to what constitutes fundamental fairness and due process of law. Justice Maxey observed at 312 Pa. 151:

> "A mere unsworn to, unbelieved, and therefore harmless lie does not reach the importance of an 'overt act' and should not be accepted as the basis of a criminal prosecution."

Justice Maxey urged further, at page 154, that mere words must result in acts so that a false statement, before it can rise to the dignity of an attempt, requires a *responsiveness to and reliance upon* the words resulting in some act wherein the intended victim *begins to part with something of*

value, but is prevented from doing so due to some intervention.

Put another way, the mere words of petitioners, without more, constituted but preparatory conduct, and not acts in the perpetration of the offense. This principle has been accepted by the Pennsylvania courts, but not applied to the facts of these cases. The Superior Court of Pennsylvania, in *Commonwealth v. Willard,* 179 Pa. Super. 368, 372; 116 A. 2d 751 (1955) recognized that acts confined to preparation only and which could be abandoned before any transgression of the law or of the rights of others lie only within the sphere of *criminal intent* and do not amount to attempts.

Close scrutiny of the facts in *Willard* points up the conclusion that the Courts of Pennsylvania not only erred in the instant cases, but did not give these cases the same consideration which the Pennsylvania Courts have taken time to give to similar cases. In *Willard* the charge was attempted abortion. The evidence showed that defendant had instructed the intended victim to remove her clothing, which she did not do; the room was equipped to commit the offense; defendant entered the room with several instruments suited only for the performance of an abortion. When defendant approached the bed in the room, the intended victim then called in a detective from an outer room who identified himself and removed the instruments and took from defendant marked money which had been given to him. In reversing defendant's conviction in *Willard,* the Superior Court emphasized that the acts of defendant had not reached the point where the crime would have been committed unless prevented by some outside interference.

It is respectfully submitted that the *words* of petitioners in the instant cases withstand the same test, but Willard's

conviction was reversed and petitioners' convictions were not. In a real sense, petitioners have not only been denied due process of law, they have been denied equal protection of the law by the Courts of Pennsylvania in not applying previous decisions to the facts of the instant cases. The trial judge, and the appellate Courts of Pennsylvania have simply glossed over any genuine analysis of petitioners' words and have *assumed* them to constitute overt acts within the definition of attempts to commit a crime, *Commonwealth v. Ellis,* 349 Pa. 402, 404; 37 A. 2d 505 (1944).

It is true that one element of the crime of attempted false pretenses is a false statement, which the jury determined to have been made in each of the cases herein. Constitutionally, more must be required of words before they can be the basis of criminal prosecution, and it is in this significant area that Justice Maxey's admonitions in *Johnson* take on meaning. *For while false words are an element of the offense,* they are equally consistent with only an intent, and absent reliance and some detriment upon the part of the victim before completion of the offense, then no crime has been made out.

Accordingly, petitioners' words, without more, were not criminal attempts, and this record presents no evidence whatever to support the convictions. Under these circumstances, the convictions are a denial of due process of law, *Sam Thompson v. City of Louisville,* 362 U. S. 199; 80 S. Ct. 624 (1960). It is submitted that the facts of the instant cases warrant review by this Honorable Court.

This Honorable Court has not previously passed upon the issue of what is required to sustain a state conviction for the crime of attempted false pretenses. This is a significant offense which could be the basis of much abuse. Guidelines from this Honorable Court are in order.

II. The evidence of conspiracy to cheat and defraud supported no more than suspicion of an unlawful agreement and was not inconsistent with innocence. Therefore, there was no evidence upon which to sustain these convictions, and to permit them to stand would violate due process of law and the decisions of this Court.

In each of the cases where conspiracy is charged (Trunzo, Ellison, Byerly) separate and distinct proof was offered. There was no general conspiracy charge involving all the victims in a single indictment. Except in so far as the same jury heard all cases, the evidence in one case was not incorporated as evidence of guilt in another. What might have been considered by the jury as a scheme or plan to defraud because of the same pattern of commercial operation, was in fact three distinct cases which had to sustain themselves. In each of the three cases, the conspiracy had to rise or fall upon proof of an unlawful agreement between the initial contact man and the salesman who eventually made the alleged false representations. It is respectfully submitted that the cases were devoid of such proof.

Considering the Ellison case first, the testimony of Robert Westman is important. He testified specifically about that case and made a brief general comment which obviously was interpreted as applying to all of the cases. As to the subject case about which he was called to testify, he clearly indicated he believed something was wrong with the boiler or burners because of rust which had accumulated (R. 145), as a result of which he called petitioner, Harold Lutsko. How then can the conspiracy conviction in the Ellison case be permitted to stand where the Commonwealth's own witness negated the existence of any agreement between Westman and petitioner to fabricate a defect?

Westman's more general statements not only conflicted with one another, they did not amount to anything more

than a statement that when employees discovered a defect they were to call their superiors. More important, Westman's general statements were not evidence in the other two conspiracy cases absent evidence that the initial contact men in those cases understood that they were supposed to fabricate defects in order to get salesmen into the homes of prospective purchasers.

In the Trunzo case, the Commonwealth's evidence is that the contact man, Felton Hughes, a co-defendant, simply indicated that there was something wrong with the furnace, and that petitioner William Lutsko then came to the home in question in response to a call from Hughes. Accepting the jury's finding that Lutsko's subsequent representations were false, what evidence is there that Lutsko and Hughes *agreed* to defraud or attempt to defraud the Trunzos? Even if the contact man knew there was nothing wrong with the furnace, his call to Lutsko to get him into the home to make a sale is not adequate evidence upon which to infer an agreement to defraud.

Finally, in the Byerly case, there is no evidence that the contact man said anything at all; he simply looked at the furnace and called petitioner who then made the representations which formed the basis of the substantive offense of an attempt. What evidence is there from which a jury could reasonably infer that the unidentified contact man and petitioner agreed to cheat and defraud the prospective customer?

Again, the Pennsylvania Courts have elected not to follow their own previous rulings which provide adequate standards upon which to determine the existence of conspiracies. Evidence of relationship or mere suspicion cannot support a conviction for conspiracy, *Commonwealth v. Petrillo,* 338

Pa. 65 (1940). Proof of acts which are consistent with innocence cannot support a verdict of guilty.

There is a tendency in the State Courts to give a loose interpretation to the law of conspiracy; the instant cases are a prime example of how mere association has been allowed to form the basis for the offense. This is the equivalent of no evidence at all, and violates the pronouncement of this Court in *Thompson v. City of Louisville, supra.* The issues here presented are substantial and require review by this Court.

III. To permit petitioner Harold Lutsko's conviction for false pretenses to stand would violate due process of law and the decisions of this Court because there is no evidence establishing the falsity of his representations.

In the Richel case, the Commonwealth's evidence clearly revealed that between the time petitioner Harold Lutsko represented the furnace was leaking carbon monoxide and the time it was inspected, it had been cleaned and serviced and was not in the same condition. There had, in fact, been a leak in the pilot tubing of the furnace. An essential element of the Commonwealth's evidence was not supplied—proof that the representation was false when it was made. It must follow that the conviction cannot stand absent any evidence to support it. Such a conviction is a denial of due process.

IV. The prejudicial conclusions of a prosecution witness, the inflammatory closing argument of the Assistant District Attorney coupled with the erroneous evidence of Robert Westman's plea of guilty (to which no exception was taken) created a prejudicial atmosphere which denied petitioners due process of law, particularly when so many cases were tried together.

An abundance of caution should have been exercised by the trial judge when it was clear that a number of cases

were being tried together. The conclusions of Mrs. Richel that the contract was "crooked", without more, called for a mistrial. Add to that the inflammatory closing of the Assistant District Attorney and it is difficult to see how petitioners could have expected the jury to deliberate in an impartial atmosphere.

Robert Westman should not have been permitted to testify as to his pleading guilty; this simply enabled the Commonwealth to prove its case by permitting the jury to infer that if Westman was guilty, the rest had to be. This issue was not raised before, but is relevant to a consideration of the entire issue of a prejudicial atmosphere, particularly when what has been said above was raised in the Pennsylvania Courts in an effort to obtain a new trial.

This trial assumed circus-like proportions when one considers the cumulative effect of these remarks and circumstances. At the very least, this Court should review this aspect of these cases to determine whether petitioners could have received a fair trial.

Respectfully submitted,

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APPENDIX

IN THE

CRIMINAL COURTS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, vs. FELTON HUGHES,	No. 535 January Term, 1966 Attempted False Pretense
WILLIAM H. LUTSKO,	No. 536 January Term, 1966 Conspiracy to Cheat and Defraud
FELTON HUGHES,	No. 547 January Term, 1966 Attempted False Pretense
WILLIAM H. LUTSKO,	No. 546 January Term, 1966 Attempted False Pretense
HAROLD S. LUTSKO,	No. 572 January Term, 1966 Attempted False Pretense
WILLIAM H. LUTSKO,	No. 573 January Term, 1966 Conspiracy to Cheat and Defraud
WILLIAM H. LUTSKO,	No. 495 June Term, 1966 Attempt to Cheat and Defraud and Conspiracy
ROBERT WESTMAN,	No. 496 June Term, 1966 Attempted False Pretense
ROBERT WESTMAN,	
HAROLD S. LUTSKO,	
ROBERT WESTMAN,	
HAROLD LUTSKO,	
WILLIAM HARRY LUTSKO,	
HAROLD STEVEN LUTSKO	

Appearance:

David O'Hanesian, Esq., Assistant District Attorney, Hubert I. Teitelbaum, Esq., for Defendants.

Argued before Judges, Toothman, McCormick, and McWilliams, *en banc.*

Opinion

The defendants were tried in June of 1967 in the Criminal Courts of Allegheny County, upon the respective charges as set forth above, and found guilty by the jury on all counts. Aside from the administrative complexity of the counts and charges being correctly identified with re-

spect to each of the defendants, there is also a certain legal complexity involved in these cases which is raised for the court's attention by the motions in arrest of Judgment and for a new trial, filed on behalf of the defendants. Both counsel in this case, the Assistant district attorney for the Commonwealth, and the attorney for the defendants have, we wish to note, rendered conspicuously commendable service throughout the trial and in the argument of this unusually difficult case.

Since the main effort of the defendants' motions is directed toward the motion in arrest of Judgment, we shall first review the reasons submitted for this motion which have been articulately and abundantly assigned. Defendants contend that there is insufficient evidence to sustain the charge of attempted false pretense which is the charge common to five of the indictments. The facts produced at the trial by the Commonwealth show quite clearly the corruption to which modern sales tactics can lead, if permitted to go unchecked by the restraint of the law. The defendants, William and Harold Lutsko, brothers, were owners and managers of a business known as Cavalier Heating Company, which, by similarity of telephone number and address, had an alias known as Clean Air, Inc. The company's *modendus operandi* was to mail cards to occupants of homes in the Pittsburgh area, advising them that because of an unused portion of a prior furnace cleaning contract, the present home owner could apply for, and receive, a free furnace cleaning job. The homeowners, in each of the cases involved, showing that some degree of gullibility is a necessary springboard for such an operation, called in to obtain the service. Immediately the company, a family owned concern, dispatched a contact man, who in these cases was most frequently one Felton Hughes. After some preliminary efforts involving the appearances of

cleaning the furnace, there would inevitably and routinely be the necessity to call the main office for some more expert assistance concerning a concealed furnace defect, which, if not remedied immediately, would lead to catastrophic results, such as explosion, exposure of the family to fatal fumes, or gas leaks seeping throughout the house.

The next link would regularly be the dispatch of the intermediate furnace authority, usually Harold Lutsko, or the ultimate furnace authority, William H. Lutsko, the other defendants, who would make a cursory check and who usually reached the same conclusion as the advance agent, and, this always against a background of dire emergency hovering about the family heating plant, who would conveniently suggest that the most advantageous settlement of the homeowner's plight would be the installation of a new furnace. Each case of attempted fraudulent pretense reaches this stage, and only one of them resulted in the consumation of the deal by a signed agreement, which is the one case charging fraudulent pretense itself.

The Act defining the crime reads as follows:

> "Whoever by any false pretense, obtains the signature of any person to any written instrument, or obtains from any other person any chattel, money or valuable security, with intent to cheat and defraud any person of the same . . . is guilty of a felony," Act of June 24, 1939, P. L. 872S836 as amended.

No quarrel can be raised that the elements which must be present for the completed crime to exist are: (1) the false representation of an existing fact, (2) made with the intent to defraud (3) calculated to deceive the confiding and unwary, (4) which does in fact deceive, and (5) the obtaining of property from another on the faith of the representation. We can find no reason based upon anything other

than the first three elements of the crime actually present. It is at the point of the fourth and fifth elements that there legimately arises a question of both fact and law. In the case of 496 June 1966, involving the furnace of John E. and Agnes Richel, where they were actually deceived into signing an installment purchase contract, we believe the last two elements do exist in full legal and factual measure. They had to believe the representations, which were proven false, or they wouldn't have bought a new furnace, and the signing of an installment agreement of the type here involved had, by the Pennsylvania courts, been construed as "something of value" for certainly a very stringent obligation is created upon the buyers, and the fact that the seller, when confronted with a renunciation, so agreeably consented to orally, does not alter the legal import that the contract can still be reduced to a Judgment lien upon their property.

This then leaves as the remaining question to be answered, whether an attempted false pretense conviction can stand, if the parties were not in fact deceived, and did not give anything of value in reliance upon the false representations. In the case of Commonwealth v. Eagan, 190 Pa. 10, p. 21, the Supreme Court held that an attempt, in general, is an overt act done in pursuance of an intent to do a specific thing, tending to the end, but falling short of the complete accomplishment of it. In law, the definition must have this further qualification, that the overt act must be sufficiently proximate to the intended crime, to form one of the natural series of acts which the intent requires for its full execution. It is not difficult to apply this definition of attempt to most crimes, such as rape, arson, burglary, robbery, etc., but what constitutes the difficulty in its application in the case at bar is the fact

that the very nature of the crime of fraudulent pretense makes it so. In effect there must be a deceiver and a person deceived to his detriment. But can there be an attempt to deceive if no one is actually deceived is the legal question involved.

Our Supreme Court has gone into this question very carefully in the case of Commonwealth v. Johnson, 312 Pd 140, and quoting from that opinion at page 143, we see evidence of the depth of the Court's consideration of the subject as follows:

> "Textbook authorities are apparently in unison on the proposition that the completed crime of false pretense is not established unless it appears that the person alleged to have been defrauded believed the false representations to be true. Thus in Wharton's Criminal law, vol. 2, 11th ed., Section 1447, p. 1629, it is said: 'It is an essential ingredient of the offense that the party alleged to have been defrauded should have believed the false representations to be true, for if he knew them to be false, he cannot claim that he was influenced by them.' In Clarks Handbook of Criminal Law, page 368, it is stated: 'Not only must there be a false pretense made but the prosecutor must part with the property relying on the pretense. If, therefore, he knows that the pretense is false when he parts with the property, the offense is not committed. . . .'"

But the Court further analyzed the law of attempted false pretense in the Johnson Case, *supra,* the fact of which disclose that a licensed practicing physician was charged with the attempt to obtain money by false pretense. A County Detective of Allegheny County had paid a visit to the doctor who, with another person, told the doctor they had a sister in failing health (which was not the fact). The doctor told the detective to write her name on a piece of paper, which he did, and after the doctor had placed it

under an electrical instrument, advised the detective that he found his sister suffering from sarcoma and other ills. The detective later returned, paid the doctor $25.00 in marked bills for the treatment, and shortly after leaving the office, two other detectives entered and arrested the defendant doctor. The Court held that it was sufficient to sustain the charge, and at p. 144 stated:

> "The law on the subject, with authorities to sustain the text is thus summed up in 25 C. J., p. 614, section 46: 'An attempt to commit the crime of obtaining money by false pretenses or the like is an indictable offense. Such an attempt consists in: (1) An intent to obtain by the false pretense, or the like: (2) the doing of some act toward obtaining the property by means of the false pretense or the like (3) the failure to obtain the property. It is not necessary that the prosecutor should have relied on the false pretenses and parted with his property. But on the contrary, if property is actually obtained in consequence of the prosecutor's reliance upon the false pretenses, the offense is complete and an indictment will not lie . . . If the accused with the requisite intent has done some act toward obtaining the property, it is none the less an attempt because for some reason unknown to him he could have completed the crime, or because the falsity of his representations is discovered before he has an opportunity to proceed further in his endeavor to obtain the property.'"

We hold that the attempt to deceive, being legally possible, with or without the intended victims' knowledge of the deceit, was factually proven in this case, and the jury's verdict, therefore, rests upon a solid foundation. A thorough and careful review of the case, and a study of defendants' counsel's brief on the subject as to what we should now determine the law to be, is an analysis with which we cannot agree. We cannot say that all that was involved here was a clever and ingenious application of the time

honored doctrine of *caveat emptor,* under the gentle protective roof of *laissez faire* where, neither the police nor criminal courts can tread. We believe, on the contrary, that to support and maintain both acknowledged principles of a free economic system we must draw the line against permitting these deceitful schemes to be perpetrated upon the consuming public. We understand the public's gullibility at times for there is some in each of us, but we cannot let it be so carefully and deceitfully exploited.

ORDER

And now this 29th day of November, 1967, the motions for a new trial and in arrest of Judgment are dismissed, and a time is directed to be set for sentencing.

BY THE COURT:

RICHARD E. McCORMICK,
H. CLIFTON McWILLIAMS, JR.,
GLENN TOOTHMAN,
13th Jud. Dis.

ATTEST:

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Clerk of Courts.

And now exceptions granted to the defendants.

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